STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: Hood, P. J., Whitbeck and Meter, JJ.

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

ERWIN HARRIS

Defendant-Appellant.
_____/

Supreme Court No. 119862

Court of Appeals No. 222468

Lower Court No. 98-11081-FC

WASHTENAW COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

GAIL RODWAN (P28597)
Attorney for Defendant-Appellant

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

BY: GAIL RODWAN (P28597)
Assistant Defender
Suite 3300 Penobscot Building
645 Griswold
Detroit, MI 48226
1 (313) 256 9833

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STATEMENT OF JURISDICTION

This Court has jurisdictions to hear this case under MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. **WAS DEFENDANT'S DUE PROCESS RIGHT TO BE CONVICTED ONLY ON THE BASIS OF LEGALLY SUFFICIENT EVIDENCE VIOLATED WHEN DEFENDANT WAS CONVICTED OF TWO COUNTS OF FELONY FIREARM UNDER AN INAPPLICABLE AIDING AND ABETTING THEORY, AND THE PROSECUTOR FAILED TO PROVE GUILT UNDER THE APPLICABLE THEORY OF CONSTRUCTIVE POSSESSION OF A FIREARM?**

Trial Court answers, "No."

Court of Appeals majority answers, "No."

Defendant-Appellant answers, "Yes".

STATEMENT OF THE FACTS

In July of 1999, Erwin E. Harris was tried by jury in Washtenaw County Circuit Court before Judge Archie G. Brown on two counts of armed robbery, MCL 750.529; two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; possession of a short-barreled shotgun, MCL 750.224b; fleeing and eluding a police officer, MCL 750.479(a)(3); assault with a dangerous weapon, MCL 750.82; and malicious destruction of police property, MCL 750.377b. He was convicted of the two armed robbery counts, two felony firearm counts and the fleeing and eluding count. He was sentenced to serve ten to twenty years for the two armed robbery counts, two years for the felony firearm counts, to be served consecutively to the armed robbery sentences, and two to five years for the fleeing and eluding count.

The charges against Mr. Harris arose from a September 28, 1998, robbery at a Mobil gas station on Zeeb Road in Scio Township. The prosecution claimed that on that evening, Mr. Harris and Eugene Mays III entered the gas station and attempted to take money from the register. Mr. Mays carried a shotgun into the station, and that gun was the only weapon used in the robbery. In the gas station during the robbery were Christopher Parson, a Mobil employee working as a clerk, and James Morton, a customer. The prosecution maintained that Mr. Harris and Mr. Mays drove away from the station after the robbery, and that the police spotted and chased them, with the chase ending in their capture. The defense said that Mr. Harris had no knowledge that Mr. Mays had a weapon in his possession until the robbery began, that he did not participate in the robbery, and that he did not obtain, hold or assist in Mr. Mays's retention of the gun. The defense said that Mr. Harris fled the area with Eugene Mays under duress.

On May 21, 1999, defense counsel moved to quash the two felony-firearm counts against Mr. Harris. The court denied the motion. (23a.)

At the trial, which began on July 19, 1999, James Morton testified that he was on his way to a football game that day and decided to stop at the gas station to buy some pop and candy for himself and his six-year-old son. (24a.) While he was in the station, a car pulled up with two men inside. Mr. Morton identified Erwin Harris as the man who entered the station to ask for directions. Mr. Morton did not see Mr. Harris leave, but when Mr. Morton looked up again he saw Mr. Harris enter the station again, followed by a second man who was holding a gun and demanding money from the clerk. (24a-25a.) Mr. Harris approached Mr. Morton, pushed against him, told him to stay cool, and then went through his pockets removing money and other items, including a driver's license, a credit card and a library card. (25a-27a.) Mr. Morton testified that when the clerk refused to give any money to the man later identified as Mr. Mays, Mr. Harris told Mr. Mays that the clerk was "asking for it" and to "just pop him." (26a.) After the clerk locked the register, the two men hit the register and then left the station. Mr. Morton testified that Mr. Harris grabbed something from the counter in front of the register before going out the door. (27a.) Mr. Morton said that he at no time saw Erwin Harris with a gun. (28a.)

The gas station clerk, Christopher Parson, testified that he was working on the evening of September 29 when a man put a gun in his face, demanding money and threatening to kill him. The gunman became quite upset when Mr. Parson responded by locking the cash register. (29a.) Mr. Parson heard a second man inside the store say, "Pop him" two or three times. That second man, whom he did not identify, tried to open the locked cash register and took some candy bars

from a shelf before he left the station. (30a-31a.) Mr. Parson saw the two men enter a car and drive out onto I-94. Mr. Parson got the license number of the car and called the police. (31a.)[1]

A short time later, Washtenaw Deputy Sheriff David Wilkinson heard a radio report describing two robbery suspects and the car they were driving. Within five minutes, Deputy Wilkinson saw the car on I-94. (32a-33a.) A chase ensued, and several Michigan State Police units joined in the chase. (35a.) State trooper Marcel Garcia positioned his vehicle in front of the suspect vehicle in an attempt to slow or stop it. The suspect vehicle hit the back end of the trooper's vehicle three times before they both finally came to a stop. The impact caused damage to the bumper of the police vehicle. (37a-39a.) At one point during the chase, the passenger threw some papers and what looked like a gun or a pipe out of his window. When the officers managed to stop the car, two men got out and ran. Deputy Wilkinson aided in the apprehension of the man he identified as Erwin Harris. (33a-35a.) Trooper Garcia testified that Erwin Harris was the driver of the vehicle. (39a.)

After the men were apprehended, Ann Arbor police officer Mark Brayton did a foot search of the area where something had been thrown out the car window, and he found a rifle. (36a.)

Numerous items were found inside the car, including candy bars and empty candy bar wrappers and a library card in the name of James Morton. (40a-41a.)

Erwin Harris was the only defense witness. He testified that he was driving from Battle Creek to Detroit when he became tired and stopped at the gas station to get directions to the home of his cousin, who lived nearby. Mr. Harris testified that he had not slept for three or four

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[1] A videotape security system inside the station recorded a portion of the event. The videotape was played for the jury, and both Mr. Morton and Mr. Parson testified that the (Footnote Continued.....)

days, and that he and Mr. Mays had been partying and using drugs in Battle Creek. He said he knew Mr. Mays had a reputation for violence, but that he did not know Mr. Mays had a gun until after they got inside the station. (42a-43a.) Mr. Harris stated that he was shocked when he saw the gun. (43a.) He testified that he was afraid of Mr. Mays, and that he took items from Mr. Morton only after Mr. Mays looked at him with "the evil eye." (46a.). He did not tell Mr. Mays to "pop" the station clerk; rather, he commented to Mr. Morton that the clerk was going to get "popped" after he saw that the clerk was refusing to open the cash register. He said that he took some candy bars off the counter, but in all the commotion put them back down, and did not take any candy bars with him out of the station. (46a.)

When they left the station, Mr. Harris decided to drive home to Detroit and get rid of Eugene Mays as quickly as he could. The police began following them, but he did not speed up or try to flee the police until Mr. Mays told him to do so and threatened him. While they were being chased by the police, Mays threw his gun out of the car. (44a.) Mr. Harris conceded that he hit the back of a police car after the officer positioned himself in front of Mr. Harris's car and then put on his brakes, but Mr. Harris testified that he did not intentionally strike the officer's vehicle. (45a.)

The jury found Edwin Harris guilty of two counts of armed robbery, two counts of felony firearm and one count of fleeing and eluding a police officer and not guilty of possession of a short-barreled shotgun, assault with a dangerous weapon and malicious destruction of police property. (52a.)

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videotape accurately reflected the scene that night.) Appellate counsel for Mr. Harris has secured a copy of the tape from the prosecution, and it is available for this Court's review.

On August 20, 1999, the court sentenced Mr. Harris to ten to twenty years on the armed robbery counts, two to five years on the fleeing and eluding count and a consecutive two years on the felony firearm counts. (53a-54a.)

Erwin Harris appealed of right, and in a divided unpublished opinion of July 27, 2001, the Court of Appeals affirmed the convictions. In a partially dissenting opinion, Judge Whitbeck stated that "the evidence introduced at trial created no factual basis for the jury to conclude that Harris was guilty of felony-firearm on a theory of aiding and abetting" (17a), and that the "net effect of the majority's reasoning is to extinguish the possessory nature of this crime and to wipe out its fundamental identity," (20a).

In an order of October 30, 2002 (21a), amended November 3, 2002 (22a), this Court granted the defense application for leave to appeal limited to the questions of whether there was sufficient evidence to convict of felony-firearm and whether *People v Johnson,* 411 Mich 50 (1981), should be overruled or modified. The Court ordered that this case be consolidated with *People v Moore,* 467 Mich 896 (2002).

I. DEFENDANT'S DUE PROCESS RIGHT TO BE CONVICTED ONLY ON THE BASIS OF LEGALLY SUFFICIENT EVIDENCE WAS VIOLATED WHEN DEFENDANT WAS CONVICTED OF TWO COUNTS OF FELONY FIREARM UNDER AN INAPPLICABLE AIDING AND ABETTING THEORY, AND THE PROSECUTOR FAILED TO PROVE GUILT UNDER THE APPLICABLE THEORY OF CONSTRUCTIVE POSSESSION OF A FIREARM.

Standard of Review

The *de novo* standard of review applies to claims of insufficiency of the evidence, *United States v Canan*, 48 F3d 954, 962 (CA 6, 1995), under a test that requires the reviewing court to view the evidence in the light most favorable to the prosecution and consider whether there was sufficient evidence to allow a rational trier of fact to find the defendant guilty beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307; 99 SCt 2781; 61 L Ed 2d 560 (1979); *People v Hampton*, 407 Mich 354, 366 (1979). In his partially dissenting opinion in this case, Judge Whitbeck said that the standard of review is *de novo* for two reasons -- because this case involves a constitutional issue implicating due process of law and because the nature of the review requires an appellate court "to examine the evidence itself." (16a.) In light of the evidence presented at trial, the prosecution failed to meet its burden of proving that Mr. Harris possessed a firearm during the commission of a felony or aided and abetted the possession of a firearm.

A conviction based on insufficient evidence is unconstitutional. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). Because Mr. Harris was convicted without the

prosecution proving an essential element of the crime of possession of a firearm during the commission of a felony, Mr. Harris was denied his right to due process under the Federal Constitution and the Michigan Constitution. US Const; Am XIV; Const 1963, art 1, § 17.

A. THIS COURT SHOULD OVERRULE *PEOPLE V JOHNSON* BECAUSE THE *JOHNSON* COURT FAILED TO APPLY ESSENTIAL PRINCIPLES OF STATUTORY CONSTRUCTION WHEN IT ERRONEOUSLY CONCLUDED THAT THE AIDING AND ABETTING STATUTE APPLIES TO THE CRIME OF POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY.

MCL 750.227b states in pertinent part: "A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony."

The Court of Appeals explained in *People v Terry,* 124 Mich App 656, 660 (1982), that by using the phrase "carries or has in his or her possession" in the felony-firearm statute, the Michigan Legislature was prohibiting two separate courses of conduct. The term "carry" ordinarily means to "hold, transport or take from one place to another." The term "possess" ordinarily means "to exert influence or control over." *Id.* The court found that the terms "carry" and "possess" in the statute were meant to describe the actual physical possession of a firearm during a felony as well as the situation where a person has a firearm available and accessible during a felony. *Id.* See also *People v Burgenmeyer,* 461 Mich 431, 436-439 (2000), for a discussion of the meaning of the term "possession" when used in the felony-firearm statute. Under the *Terry* analysis, the crime of felony-firearm can be accomplished in only two ways: by physically carrying the firearm or by possessing the firearm. The firearm can be possessed in only two ways: by physical possession or by constructive possession.

This Court granted leave in *People v Johnson,* 411 Mich 50 (1981), to decided whether it is possible for one to aid and abet this unique possessory crime. It erroneously concluded that it is. More than twenty years later, the Court now asks the parties to address whether *Johnson* should be modified or overruled. *Johnson* should be overruled. Its conclusion that the aiding and abetting statute applies to the crime of possession of a firearm during the commission of a felony was reached without consideration of the rules of statutory construction or the public policy purposes for enactment of the felony-firearm statute. A textual analysis of the felony-firearm statute establishes that the crime applies only to those who carry or possess the firearm. Neither carrying nor possessing is required under the aiding and abetting statute. In its 1981 *Johnson* decision, the Court failed to engage in a textual analysis, or in much analysis at all. It first repeated the language of the aiding and abetting statute, MCL 767.39:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in the commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

It then concluded that the two cases before it should be remanded because the record in neither case showed that the defendant assisted the person with the gun to obtain or retain possession. The Court failed to explain *why* the aiding and abetting statute should be applicable to a statute which by its terms specifies two exclusive ways of possessing the firearm where such possession occurs during the commission of a separate felony. When one turns to the rules of statutory construction, one sees how the Court came to the wrong conclusion in *Johnson.*

The first rule of statutory construction is that a court must give effect to the intent of the legislature. *Wayne County Prosecutor v Recorder's Court Judge,* 406 Mich 374, 393 (1979). A statute must be read in light of the purpose sought to be accomplished, and once that purpose is

discerned, legislative intent *must* be given effect. *People v Stoudemire,* 429 Mich 262 , 265-266 (1987). So, too, must every word, phrase, clause and sentence in a statute. *People v Einset,* 158 Mich App 608, 611-612 (1987).

The legislature is presumed to know of and legislate in harmony with other existing laws. *People v Cash,* 419 Mich 230, 241 (1984). When two statutes are in *pari materia* and are in conflict, the statute last enacted will control or be regarded as an exception to or qualification of the earlier statute. *Pryber v Marriott Corp,* 98 Mich App 50, 56 (1980), *affirmed* 411 Mich 887 (1981). When a statute specific in language is enacted after a general statute covering the same subject matter, the later statute constitutes an exception to the general statute if the two conflict. *People v LaRose,* 87 Mich App 298, 303 (1978). Michigan's aiding and abetting statute, which extinguished the distinction between accessories and principals, took effect in 1927. Michigan's felony-firearm statute did not take effect until 1976. One must presume that our Legislature was well aware of MCL 767.39 when it enacted MCL 750.227b. Since the statute last enacted and more specific in language must control, one must further presume that the legislature knowingly created an exception or qualification to MCL 767.39 when it included language in the felony-firearm statute limiting culpability to those who carry a firearm or have a firearm in their possession.

Further, under the principle of *expressio unius est exclusio alterius*, the express mention in a statute of one thing implies the exclusion of similar things. *People v Samuel Lee,* 66 Mich App 5, 9 (1975). The express mention in the felony-firearm statute of carrying or having in one's possession a firearm implies the exclusion of any different ways of committing the offense. "One may not speculate concerning the probable intent of the Legislature beyond the words expressed in a statute." *People v Dillard,* 246 Mich App 163, 166 (2001).

Interpreting MCL 750.227b to apply only to carriers and possessors of the firearm, and not to those who aid and abet the carriers and possessors, is not only consistent with rules of statutory construction, it is consistent with the legislative purpose for enactment of the felony-firearm statute:

> The Legislature has clearly expressed its judgment that *carrying* a firearm during any felony which may, but need not necessarily, involve the carrying of a firearm, entails a distinct social harm inimical to the public health, safety and welfare which deserves separate treatment. In order to deter the use of guns, the Legislature has chosen to create a separate crime. *Wayne County Prosecutor v Recorder's Court Judge,* 406 Mich 374, 391 (1979); emphasis added.
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> The Legislature intended the felony-firearm statute to reduce the possibility of injury to victims, passersby, and police officers posed by a criminal's *utilization* of a firearm and to deter the underlying felony itself. *People v Dillard, supra,* at 171, emphasis added.

This Court has said more than once regarding the language of the felony-firearm statute that "it [is] clear that the Legislature intended, with only a few narrow exceptions, that every felony *committed by a person possessing a firearm* result in a felony-firearm conviction." *People v Mitchell,* 456 Mich 693, 697 (1998), quoting *People v Morton,* 423 Mich 650, 656 (1985); emphasis added. "To be guilty of felony-firearm, one must *carry or possess* the firearm, and must do so *when* committing or attempting to commit a felony." *People v Burgenmeyer, supra,* at 438; emphasis in the original.

While it is possible that an aider and abettor may carry or possess a firearm during some portion of the commission of the predicate felony, the aiding and abetting statute does not require that he or she do so. For example, one who provides another with a firearm that is used in a later felony (one who "procures" under the language of MCL 767.39) may aid and abet the possession

without physically or constructively possessing the firearm during another person's actual commission of the underlying felony.

Whether one may *ever* be an aider and abettor to an exclusively possessory crime is beyond the scope of this appeal. Suffice it to say that felony-firearm is unique among possessory crimes in Michigan. It is the only possessory crime that arises only on commission of a second crime, for which one is subject to separate conviction and punishment (Mr. Erwin was convicted of two separate counts of armed robbery, for which he is serving two ten- to twenty-year prison terms). It is the only possessory crime that carries a flat mandatory sentence that is mandatorily consecutive to the sentence for the separate underlying felony and mandatorily enhanced on an offender's second and third felony-firearm conviction.

Under current application of the *Johnson* decision, one aids and abets felony-firearm by knowingly performing an act or giving encouragement with the intent of assisting another to keep or retain possession of the firearm. See *People v McGuffey,* 251 Mich App 155, 160 (2002). However, carrying or possessing a firearm, even where that possession is constructive rather than actual, requires something more. Along with the *intent* to control the firearm, possession requires the *power* to control it as well.

B. THERE WAS LEGALLY INSUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF CONSTRUCTIVELY POSSESSING THE FIREARM BECAUSE THE RECORD ESTABLISHES THAT DEFENDANT LACKED THE POWER TO EXERCISE DOMINION OR CONTROL OVER THE FIREARM.

At trial, the prosecutor requested the jury instruction on aiding and abetting felony-firearm and argued to the jury in closing that Defendant Harris aided and abetted Mr. Hays's possession of the firearm during the robbery. (47, 48a.) While the court instructed the jury on aiding and abetting the firearm, it did not instruct the jury on constructive possession of the

firearm. One cannot assume that constructive possession is a concept within the general understanding of jurors or, even if it is, that the jurors at this trial would have understood, without being told so, that the word "possession" in the jury instructions embodied the concept of constructive possession. The jurors at Mr. Harris's trial had no opportunity to consider constructive possession because that concept was not explained, or even mentioned, in the jury instructions. (49a-51a.) A jury is presumed to follow the instructions a court gives it, *People v Hana,* 447 Mich 325, 351 (1994), citing *Richardson v Marsh,* 481 US 200, 211; 107 S Ct 1702; 95 L Ed 2d 176 (1987), but it is not presumed to follow instructions it never heard. Nonetheless, in its application for leave to appeal to this Court, the prosecution, citing *People v Hill,* 433 Mich 464, 470 (1989), argued to this Court that the two men were acting in concert and thus jointly possessed the firearm or that Mr. Harris constructively possessed the firearm. The prosecutor maintained that because Mr. Harris "attempted to exercise control of the firearm by directing Mays to shoot the clerk, his actions satisfied 'the federal rule [that] a person has constructive possession if there is proximity to the article together with indicia of control.'" (55a-57a.)

The federal rule regarding constructive possession is also the Michigan rule, as this Court explained in *Hill* at 470-471:

> Michigan courts also have recognized that the term "possession" includes both actual and constructive possession. As with the federal rule, a person has constructive possession if there is proximity to the article together with indicia of control. *People v Davis,* 101 Mich App 198; 300 NW2d 497 (1980). Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant. Physical possession is not necessary as long as the defendant has constructive possession. *People v Terry,* 124 Mich App 656; 335 NW2d 116 (1983).

Aiding and abetting and constructive possession are two distinct concepts in the law, and they require different proofs. Aiding and abetting is not a separate substantive offense; it is

merely a theory of prosecution. *People v Perry,* 460 Mich 55, 63 n20 (1999). It requires the prosecution to prove three elements: 1) the charged crime was committed by the defendant or some other person; 2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and; 3) the defendant intended the commission or the crime or had knowledge that the principal intended it at the time the defendant gave aid and encouragement. *People v Izarraras-Placante,* 246 Mich App 490, 495-496 (2001). Constructive possession requires the prosecution to prove three elements as well: 1) the defendant knew the location of the object; 2) the defendant was able to exercise control over the object, and; 3) the defendant intended to exercise such control. These three elements are embodied in the classic definition of constructive possession found in *People v Hill, supra,* at 470, quoting *United States v Burch,* 313 F2d 628, 629 (CA 6, 1963): one is in constructive possession if one "knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person." *Accord, People v Burgenmeyer, supra*, at 439*; People v Wolfe,* 440 Mich 508, 520, *amended* 441 Mich 1201 (1992).

While the third element – intent – is the same for both aiding and abetting and constructive possession, the first and second elements are not the same. The same set of facts may establish both aiding and abetting and constructive possession in *some* cases, but it will not do so in *all* cases.

Possession of a firearm may be actual or constructive and may be proved by circumstantial evidence. *People v Hill, supra,* 469-471. The crime of felony-firearm requires the defendant's proximity to the gun at the time the underlying felony is being committed, along with indicia of the defendant's control. *People v Burgenmeyer, supra,* at 438-439. "Indicia" is just another word for "evidence." See *Random House Dictionary of English Language*

(unabridged 1971 edition), p 724. Reasonable inferences may be drawn from evidence, whether that evidence is direct or circumstantial, *People v Hardiman,* 466 Mich 417, 428 (2002), but one cannot reasonably infer dominion or control over a firearm without first establishing a factual connection between the accused and the possession of the gun. Or, as stated somewhat differently in *United States v Disla,* 805 F2d 1340, 1350 (CA9, 1986), a case that was cited with approval by this Court in *People v Wolfe, supra,* at 521-522: "The ultimate question is whether, viewing the evidence in a light most favorable to the government, the evidence establishes a sufficient connection between the defendant and the contraband to support the inference that the defendant exercised dominion and control over the substance."

The flaw in the prosecution's analysis is that it assumes that an attempt to exercise control constitutes evidence of actual control. That is simply untrue. As we see every day in a myriad of life situations, an attempt to exercise control over a situation or an object often falls far short of the actual exercise or ability to exercise control.

Under its aiding and abetting analysis, the Court of Appeals majority pointed to two pieces of evidence in this case to support the nexus requirement: 1) Mr. Harris drove Mr. Mays to the gas station where the robbery occurred; 2) Mr. Harris told Mr. Mays to "pop him" after the clerk, Christopher Parson, refused to open the cash register. However, just as driving someone who has a firearm does not constitute aiding and abetting that person's possession of the firearm, so too it does not constitute evidence of dominion or control over that firearm. Counseling the person who is in physical possession of the gun to "pop" another person may help to establish constructive possession, but only when coupled with evidence of dominion or control over the gun. Here, where Mr. Mays pointedly *ignored* Mr. Harris's direction to use the gun to shoot Christopher Parson, the record establishes not Mr. Harris's control but, rather, his lack of control.

It was the prosecution's position in its application to this Court that constructive possession could be established by proof of a joint criminal venture. The concept of joint venture is well established in Michigan law but, as this Court pointed out in *People v Wolfe, supra,* at 521, when the charge is possession of a firearm the joint venture must be to possess the firearm, and not just to commit the predicate felony for the firearm offense. A survey of cases from other jurisdictions confirms that joint criminal activity involving a gun is sufficient to establish constructive possession of the gun by the person not carrying it so long as there are indicia of that person's dominion or control of the gun.

In *Smith v United States,* 684 A2d 307, 312-313 (DC App 1996), for example, a mother's conviction for possession of a firearm during the commission of a crime of violence was upheld under a constructive possession theory where the mother urged her son to shoot another person and he did so. The court found that the mother knew her son had the gun and was able to exercise and intended to exercise control over the gun when she directed her son to fire the gun and he acted on her directive.

Similarly, in *People v Rivera,* 77 AD2d 538, 539; 430 NYS2d 88 (1980), the court upheld the defendant's conviction for possessing a weapon with intent to use it unlawfully against another when the defendant, Felix, told his brother, Raul, to get a gun and shoot two people with whom the defendant's family was having a dispute. Raul did as he was told, and the court concluded that the defendant had complete control and dominion of the weapon through his brother. The court said that Raul had responded physically to effectuate the will of the defendant, Felix: "[W]hile it is true that brother Felix never had the gun in his hand, he had complete "dominion" and "control" over it, commanding brother Raul to get it and bring it and

pull the trigger. Raul's act was that of Felix as though Felix had used his muscles instead of his voice and his will . . .".

In *State v Jennings,* 335 SC 82, 85-87; 515 SE2d 107 (1999), the court upheld the defendant's conviction for possession of a firearm during the commission of a violent crime where it was determined that defendant was the ringleader in a scheme to rob a pharmacist of drugs. Defendant directed his partner to stand at the counter with the gun while the defendant demanded the drugs and, at one point, he ordered the partner to remove the gun from under his jacket and display it to the pharmacist, which the partner did.

In *White v United States,* 647 A2d 766, 767 (DC 1994), multiple defendants were convicted of various offenses including murder, armed robbery and possession of a firearm while committing a crime of violence. While conceding that the issue was a close one, the court concluded that there was sufficient evidence to convict the defendant of the firearm offense under a constructive possession theory, applying an "ability to guide the gun's destiny" test. The defendant had been an active participant in planning the crimes, had supplied three of four guns used in the crimes, continued to rob one of the armed robbery victims even after a co-defendant had shot another, participated in hiding the guns after the crimes and participated in the decision to send someone to retrieve the hidden weapons sometime later. All of these facts were found to support an inference that the defendant had the ability to exercise control, and therefore "guide the destiny" of the weapon that was used in the shooting.[2]

[2] In contrast is *United States v Walls,* 225 F3d 858 (CA 7, 2000), where the court held that the government could not rely on co-conspirator liability to convict a defendant of being a felon is possession of a firearm in violation of 18 USC 922 (g)(1). In the absence of constructive possession by the defendant, the co-conspirator's possession was simply too remote a connection to the firearm to support the defendant's criminal liability.

In these cases the defendant did not physically possess the gun during the violent act, but nonetheless controlled another's possession of the gun or, in the language of *White v United States, supra,* had the ability to "guide the gun's destiny." In each instance, when the defendant directed another person's possession, use or display of the gun in some way, that other person responded to the defendant's specific directions. In this case, however, the facts demonstrate that Eugene Mays would not permit Defendant Harris to direct Mr. Mays's possession of the gun. Erwin Harris may have had the intent, but he did not have the power, to control the gun, and power is the essence of constructive possession.

IV. CONCLUSION

This Court should overrule *People v Johnson, supra,* because that case erroneously concluded, contrary to the language and intent of MCL 767.39, that a non-possessor may be guilty of possessing a firearm during the commission of a separate felony. Because the aiding and abetting statute was inapplicable to Erwin Harris, he should not have been convicted of two counts of felony-firearm as an aider and abettor. Because the jury was not instructed on the theory of constructive possession, his conviction cannot be upheld now on a theory that he constructively possessed the firearm, because to uphold the conviction on that theory would require this Court to substitute its judgment for a judgment the jury never had an opportunity to make. Even if this Court *did* apply the theory of constructive possession for the first time on appeal, it would find the proofs insufficient for conviction because constructive possession

requires not only the intent to assert control over the firearm, but the power to do so.[3] The record here does not simply fail to establish that Erwin Harris had such power, it affirmatively establishes that he did not have it.

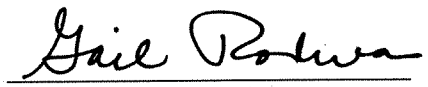
[3] Similarly, if this Court applied the aiding and abetting theory, it would find the proofs legally insufficient for the reasons stated by Judge Whitbeck in his partially dissenting opinion in the Court of Appeals because Mr. Harris did not procure, counsel, aid or abet Eugene Mays's possession of the firearm. Neither driving Mr. Mays to the scene nor urging him to shoot constitutes procuring, counseling, aiding or abetting *possession* of a firearm. See *People v Eloby (After Remand),* 215 Mich App 472 (1996); *People v Beard,* 171 Mich App 538 (1988); *People v Bruno,* 115 Mich App 656 (1982); *People v Morneweck,* 115 Mich App 156 (1982).

SUMMARY AND RELIEF

Defendant-Appellant Erwin Harris asks this Honorable Court to vacate his convictions for possession of a firearm during the commission of a felony.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: 

GAIL RODWAN
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

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